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COURT OF CRIMINAL APPEALS
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IN THE
COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FERNANDO SMITH

Appellant

v.

STATE OF TEXAS

Appellee

APPEAL FROM THE 52ND JUDICIAL DISTRICT COURT
OF CORYELL COUNTY, TEXAS
TRIAL COURT CAUSE NUMBER: FAM-09-20141
COURT OF APPEALS CAUSE NO. 10-15-00263-CR

STATE'S BRIEF

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November 20, 2017

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TRIAL JUDGES

The Honorable Judge Trent Farrell
The Honorable Judge Phillip Zeigler
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Coryell County Courthouse
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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State does not request oral argument. This Court has not granted oral argument.[1]

STATEMENT OF THE CASE

This is an appeal from a probation revocation and subsequent judgment of "shock" probation. Appellant was originally indicted for Assault, Family Violence by Occlusion in December 17, 2009.[2] On January 22, 2010, Appellant entered a plea of guilty to the Assault charge.[3] The trial court deferred the finding of guilt and placed Appellant on five years deferred adjudication.[4] On May 19, 2010, Appellant's conditions of supervision were modified.[5] On March 16, 2012, Appellant's terms and conditions were modified again.[6]

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1 *In re Smith*, No. PD-0514-17, 2017 Tex. Crim. App. LEXIS 766, at *1 (Crim. App. Aug. 23, 2017); Tex. R. App. P. 75.2.
2 (1 CR 4). *See* Tex. Pen. Code §22.01(a)(1)(b)(2)(B) (West 2010).
3 (1 CR 11 -15).
4 (1 CR 16, 17).
5 (1 CR 24, 25).
6 (1 CR 27).

The State filed its First Motion to Adjudicate Guilt and Revoke Community Supervision on June 12, 2013. This Motion was subsequently dismissed.[7] On June 10, 2014, the State filed its Second Motion to Adjudicate Guilt and Revoke Community Supervision. The Motion alleged Appellant violated two conditions of his deferred adjudication.[8] On July 21, 2014, Appellant's terms and conditions were again amended, presumably as part of a plea bargain, to extend Appellant's supervision for an extra year and adding requirements to pay $1,000.00 towards his arrearages and $300.00 in attorney fees.[9]

On February 5, 2015, the State filed its third Motion to Adjudicate Guilt and Revoke Community Supervision. The Motion alleged Appellant violated three of the terms and conditions of his community supervision.[10]

A contested Motion to Adjudicate Guilt hearing was held on April 29, 2015. Appellant entered a plea of Not True to Count One and True to Counts Two and Three.[11] The contested hearing was continued to May 13, 2015. Following the conclusion of the evidence and argument of counsel, the trial court took the case

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7 (1 CR 31 – 33, 41).

8 (1 CR 49, 50).

9 (1 CR 58, 59).

10 (1 CR 62, 63, 89, 90). The violations were for the commission of a new offense (Theft), failing to remain in the county of supervision and failure to pay his supervision fees, owing $1,910.00.

11 (3 RR 5,6). Appellant initially stipulated to all the violations, then his trial attorney clarified the stipulations were only to the second and third counts. *See* State's exhibit no. 1. (1 CR 88), (3 RR 4, 5).

under advisement.[12] On May 29, 2015, the case re-convened whereupon the trial court found Appellant violated the three terms of his community supervision as alleged, adjudicated Appellant guilty of the offense alleged in the indictment, and sentenced Appellant to five (5) years in the Texas Department of Criminal Justice – Institutional Division.[13]

The trial court's certification of Appellant's right to appeal was filed on May 29, 2015.[14] On June 15, 2015, Appellant filed his Motion for New Trial.[15] On that same date, Appellant also filed his Notice of Appeal.[16]

On October 2, 2015, Appellant filed his Motion to Impose Community Supervision.[17] On October 14, 2015, a hearing was conducted on Appellant's Motion. The trial court granted Appellant's Motion, returned Appellant to community supervision, probated his original five-year sentence to two years, and continued the previous terms and conditions including any monetary amounts

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12 (4 RR 4 - 18).

13 (5 RR 8, 9), (1 CR 93, 94). The judgment also reflected a fine of $535.00, court costs of $235.00 and restitution for Attorney fees of $300.00. A Judgment Nunc Pro Tunc was subsequently issued on June 4, 2015 correcting the "Terms of Plea Bargain" among other things. (1 CR 95, 96).

14 (1 CR 92).

15 (1 CR 80, 81).

16 (1 CR 99, 100).

17 (1 Supp. CR 3, 4).

owed.[18] A new trial court certification was not filed, nor was a new or amended notice of appeal filed.[19]

On appeal, the Tenth Court of Appeals found that because Appellant had not filed a new notice of appeal, subsequent to the trial court's granting of his motion for shock probation, it had no jurisdiction of the complaints raised by Appellant.[20]

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[18] (6 RR 4 – 8), (1 Supp. CR 5 – 9).

[19] *See* Tex. Rule App. Proc. 25.2(d).

[20] *See Smith v. State*, 518 S.W.3d 641, 645 (Tex. App.—Waco 2017, pet. granted). Appellant sought to appeal a condition of his community supervision.

REPLY TO THE ISSUE PRESENTED

Reply to Issue:

When Appellant files a Notice of Appeal from an Order Adjudicating Guilt, must he file a new Notice of Appeal to appeal a condition of community supervision imposed pursuant to a subsequent order granting him shock probation?

STATEMENT OF FACTS

The State agrees with Appellant's Statement of Facts with the following additions.[21]

The Motion to Adjudicate

Appellant had a contested Motion to Adjudicate.[22] The State introduced the plea paperwork as State's exhibit no. 1.[23] The State put on evidence concerning the theft allegation.[24] Following the presentation of the State's evidence, the State rested.[25] Appellant's testimony began.[26] Prior to the State's cross examination of Appellant, the hearing was reset.[27]

The hearing continued on May 13, 2015. [28] Following Appellant's testimony, the defense rested. Both sides closed.[29] After argument of counsel, the Court took the matter under advisement.[30]

On May 29, 2015, the Court found the allegations contained in conditions one, two and three, true. The Court adjudicated guilt and sentenced Appellant to five (5)

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21 *See* Appellant's brief.
22 (3 RR 4 – 6).
23 *See* State's exhibit no. 1 (7 RR 1), (1 CR 62, 63, 89, 90).
24 (3 RR 7 – 15).
25 (3 RR 19).
26 (3 RR 20 – 31).
27 (3 RR 31).
28 (4 RR 5 – 12).
29 (4 RR 13).
30 (4 RR 18).

years Texas Department of Criminal Justice-Institutional Division and assessed the balance of all fines, fees and court costs. The Court noted any current balances would be assessed on the judgment.[31] The Judgment adjudicating guilt reflects a fine of $535.00, Court costs of $235.00 and Restitution of $300.00. The second page of the Judgment indicates the restitution of $300.00 was for previous court appointed attorney fees.[32] On June 4, 2015, a Nunc Pro Tunc Judgment was entered reflecting a fine of $235.00, no court costs and $300.00 attorney fees. The amount entered under restitution remained $300.00.[33]

Appellant's Motion for New Trial and Notice of Appeal

Appellant timely filed his Motion for New Trial and Notice of Appeal on June 15, 2015.[34] No action was taken on the Motion for New Trial. The Notice of Appeal states Appellant desired to appeal the final judgment and all other appealable orders and/or decisions of the trial court.[35]

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31 (5 RR 8, 9). The Court also noted Appellant had the right to appeal.
32 (1 CR 93, 94).
33 (1 CR 95, 96).
34 (1 CR 80, 81, 99). The Motion for New Trial was overruled by operation of law.
35 (1 CR 99).

Appellant's Motion for "Shock" Probation

On October 2, 2015, Appellant filed his Motion to Impose Community Supervision.[36] The Motion was heard on October 14, 2015, before the Hon. Phillip Zeigler.

The hearing consisted of the trial court asking Appellant if he was asking the Court to place him on probation and if he had disposed of his previous theft case.[37] The trial court then states:

> THE COURT: "Well, what the Court is going to do, due to the fact that you were [on] probation for almost a period of five years previously, which was the period of your probation you're revoked, I'm going to continue to place you on probation. You were sentenced to five years. I am now going to probate that five year sentence for two years --
> THE DEFENDANT: Yes, sir.
> THE COURT: -- from today's date. You will be under the terms and conditions of supervision that you were previously on. Are you going to be living in Harris County?
> THE DEFENDANT: No, sir.
> THE COURT: Where are you going to be living?
> THE DEFENDANT: Copperas Cove."[38]

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[36] (1 Supp. CR 3,4). "Shock probation" was authorized by Article 42.12, sec. 6 of the Texas Code of Criminal Procedure. Effective January 1, 2017, the Texas Legislature repealed Article 42.12 and enacted Chapter 42A, which is a non-substantive revision of the community supervision laws. *See* Act of May 26, 2015, 84th Leg., R.S., ch. 770, §§ 1.01, 3.01, 4.01-.02 (codified at Tex. Code Crim. Proc. Ann. ch. 42A). Former Article 42.12, § 6 addressed the continuing jurisdiction of a court in felony cases. The current version of the statute is now Article 42A.202. *See* Tex. Code Crim. Proc. Art. 42A.202 (West Supp. 2016).

[37] (6 RR 4, 5).

[38] (6 RR 6, 7). The trial court also spoke with Appellant's parents.

The Court granted Appellant's Motion, placed him on "shock" probation and probated his five (5) year sentence for two (2) years. The Court noted Appellant would be under the terms and conditions he was under previously.[39] The State did not oppose Appellant's Motion.

The hearing on Appellant's Motion concluded as follows:

> "THE COURT: Everything will remain the same previously and any fines, court cost, or anything else previously assessed will be. If there's restitution –
> MS. SPEER [prosecutor]: I don't think there was any restitution.
> THE COURT: Anything that was previously ordered by the Court will be ordered. Now, do you agree that -- I guess I haven't really followed the plea bargain. Your attorney requested shock probation. You've been given shock probation. Do you have any objection to that?
> THE DEFENDANT: No, sir.
> THE COURT: All right. Good enough. Go with probation at this time.
> THE DEFENDANT: Thank you."[40]

The Judgment adjudicating guilt entered on October 14, 2015, reflects the $235.00 fine but does not reflect any restitution.[41] The terms and conditions of Appellant's "shock" probation indicate, at paragraph #13, Appellant was required to pay the fine of $235.00, no court costs, and the attorney's fee of $300.00. The

[39] (6 RR 4 – 6).
[40] (6 RR 7, 8).
[41] (1 Sup. CR 8, 9).

Appellant was required to also pay, in paragraph #14, "restitution or reparation of $2,045.00 in as determined by the court".[42] Appellant acknowledged the terms and conditions as indicated by his signature.[43] A new trial court certification was not filed, nor was a new notice of appeal nor an amended notice of appeal filed.[44]

ON APPEAL

Appellant, on appeal, did not contest any issue arising from the adjudication of May 29, 2015. He attempted to contest only the amount of restitution he was required to pay as part of his terms and conditions of "shock probation" from October 14, 2015.[45]

Concerned about whether it had jurisdiction to entertain the appeal of the restitution issue, the Tenth Court of Appeals asked Appellant to respond to his failure to file a new notice of appeal from the trial court's granting of his shock probation.[46] Appellant argued he was not required to file a new notice of appeal from the granting of shock probation. He argued his original notice of appeal was sufficient to vest

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[42] (1 Supp. CR 5 – 7). Appellant was also required to pay a $60.00 monthly supervision fee.
[43] (1 Supp. CR 7).
[44] *See* Tex. R. App. P. 25.2(d).
[45] *See* Appellant's brief on original submission to the Court of Appeals. "Shock probation" was authorized by Article 42.12, sec. 6 of the Texas Code of Criminal Procedure (Effective January 1, 2017, the Texas Legislature repealed Article 42.12 and enacted Chapter 42A, which is a non-substantive revision of the community supervision laws. *See* Act of May 26, 2015, 84th Leg., R.S., ch. 770, §§ 1.01, 3.01, 4.01-.02 (codified at Tex. Code Crim. Proc. Ann. ch. 42A). Former Article 42.12, § 6 addressed the continuing jurisdiction of a court in felony cases. The current version of the statute is now Article 42A.202. *See* Tex. Code Crim. Proc. Art. 42A.202 (West Supp. 2016).
[46] *See Smith v. State*, 518 S.W.3d 641, 643 (Tex. App.—Waco 2017, pet. granted).

appellate jurisdiction. Alternatively, he argued the original notice of appeal should be considered a premature notice of appeal and therefore deemed effective following the grant of shock probation.[47]

The State also questioned the Tenth Court's jurisdiction and filed its own Motion to Dismiss for Lack of Jurisdiction.[48] The State argued in its Motion, and subsequent brief, that the Court of Appeals did not have jurisdiction to consider the appeal because an appeal does not lie from the granting of shock probation.[49] The State also argued the Tenth Court did not have jurisdiction because there was no trial court certification filed following the Judgment granting shock probation.[50]

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47 *Id* at 643, 644.

48 The State's position was, and continues to be, that the Court of Appeals did not have jurisdiction to hear an appeal of an Order granting "shock" probation. *See* Tex. Code Crim. Proc. Art. 42.12 §6 (West 2015) now Tex. Code Crim. Proc. Art. 42A.202 (West Supp. 2016); *see also Pippin v. State*, 271 S.W.3d 861, 864 (Tex. App. – Amarillo 2008, no pet.) (dismissing appeal for lack of jurisdiction to review an order granting shock probation); *Perez v. State*, 938 S.W.2d 761, 762-63 (Tex. App. - Austin 1997, pet. ref'd) (dismissing appeal for lack of jurisdiction because defendant cannot appeal an order granting shock probation). *Shortt v. State*, No. 05-13-01639-CR, 2015 Tex. App. Lexis 4808 at *6 (Tex. App. – Dallas May 12, 2015 pet. granted) (mem. op. not designated for publication) (There is no statutory authority which confers jurisdiction upon an appellate court jurisdiction to consider an appeal from an order imposing shock probation pursuant to Art. 42.12 Texas Code of Criminal Procedure).

49 *See Shortt v. State*, No. 05-13-01639-CR, 2015 Tex. App. LEXIS 4808 (Tex. App.—Dallas May 12, 2015, pet. granted) (mem. op. not designated for publication) and the first issue in the petition for discretionary review in that appeal which is currently pending before the Court of Criminal Appeals*; see also* State's Motion to Dismiss and State's brief on original submission to the Tenth Court of Appeals.

50 *See* State's brief on original submission to the Tenth Court of Appeals.

The Tenth Court first found there was effectively a new sentencing hearing and an entirely new and complete judgment signed by the trial court rather than merely an order that suspended the sentence set out in the prior judgment and enunciated the conditions of community supervision. The Court found that "[t]his makes the issues cleaner and easier to address and very different from the issue as addressed in *Shortt v. State*".[51]

Having found, that there was a new judgment rather than an order, the Tenth Court found Appellant was required to file a new notice of appeal in order to complain about the trial court's granting of his shock probation on appeal.[52] The Court also found the original notice of appeal could not be considered prematurely filed because it was filed after the sentence had been imposed.[53] The Court concluded because Appellant had not filed a new notice of appeal following the grant of his shock probation, it did not have jurisdiction.[54]

As to the State's arguments, the Court of Appeals only addressed the issue of whether it had jurisdiction over an appeal from the granting of shock probation. The

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51 *Smith v. State*, 518 S.W.3d 641, 643 n.1 (Tex. App.—Waco 2017, pet. granted); *Shortt v. State*, No. 05-13-01639-CR, 2015 Tex. App. LEXIS 4808 (Tex. App.—Dallas May 12, 2015, pet. granted) (mem. op. not designated for publication).

52 *See Smith* at 643.

53 *Id.*

54 *Id.*

Court found that because there was a new "Judgment" rather than just an "order", it did have jurisdiction over an appeal from the granting of shock probation.[55]

[55] *See Smith at 643.*

SUMMARY OF ARGUMENT

Appellant argues he does not need to file a new notice of appeal from the granting of shock probation in order to complain about one of its conditions. He argues the original notice of appeal filed after the judgment adjudicating guilt was sufficient. He alternatively argues the original notice of appeal should be considered prematurely filed.

The State agrees the Tenth Court of Appeals did not have jurisdiction in this case. It agrees with the Tenth Court that if the trial court's granting of shock probation could be considered an appealable order, Appellant would be required to file a new notice of appeal. The State also agrees with the Tenth Court that Appellant's original notice should not be considered prematurely filed.

However, the State also respectfully disagrees with the reasoning of the Tenth Court concerning why it did not have jurisdiction. The State argues the Judgment Adjudicating Guilt was not a new Judgment and therefore not an appealable order.

The key issue here, is whether Appellant even has a right to appeal. If he does not, then it doesn't matter whether, or not, he had to file a new notice of appeal. Therefore, before the issue of whether a new notice of appeal must be filed, this Honorable Court must necessarily decide if the trial court's granting of Appellant's

motion for shock probation is an appealable order. If it is not, then this issue is moot. The State's position is that this issue is moot because Appellant cannot appeal from either an Order or Judgment granting or denying his motion to impose shock probation.[56]

Alternatively, should this Honorable Court find the trial court's Judgment granting shock probation a new Judgment and an appealable order, then the State agrees with the Court of Appeals that Appellant needed to file a new Notice of Appeal and that the original notice of appeal should not be considered prematurely filed.

[56] Should this Honorable Court find this was an appealable order, then the matter of the trial court certification would also arise and need to be addressed by the Court of Appeals. *See* Tex. R. App. P. 25.2(d); *see also Cortez v. State*, 420 S.W.3d 803, 806 - 07 (Tex. Crim. App. 2013) (Appellate court should order trial court to supplement the record with the certification).

Reply to Issue Restated:

> ***When Appellant files a Notice of Appeal from an Order Adjudicating Guilt, must he file a new Notice of Appeal to appeal a condition of community supervision imposed pursuant to a subsequent order granting him shock probation?***

I. ARGUMENT AND AUTHORITIES

A. A Timely Notice of Appeal invokes the Appellate Court's Jurisdiction

The central issue here is whether Appellant's notice of appeal filed after the trial court's adjudication but prior to the trial court's granting of shock probation was timely. "A timely notice of appeal is necessary to invoke a court of appeals' jurisdiction."[57] The Rules of Appellate Procedure provide that a defendant has thirty days from the date of an appealable order to file a notice of appeal.[58] "If a notice of appeal is not timely filed, the court of appeals has no option but to dismiss the appeal for lack of jurisdiction."[59] Only a timely notice of appeal invokes the jurisdiction of

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[57] *Perez v. State*, 424 S.W.3d 81, 85 (Tex. Crim. App. 2014) quoting *Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996); accord *Castillo v. State*, 369 S.W.3d 196, 198 (Tex. Crim. App. 2012).

[58] *See* Tex. R. App. P. 26.2(a)(1); *Ex parte Matthews*, 452 S.W.3d 8, 10 (Tex. App.—San Antonio 2014, no pet.); *Olivo*, at 522*;* A Motion for New Trial extends the time limit to ninety days. (Tex. R. App. P. 26.2(a)(2).

[59] *Ex parte Matthews* 452 S.W.3d at 11 quoting *Castillo*, 369 S.W.3d at 198; *see Olivo*, 918 S.W.2d at 522.

the court of appeals.[60]

If appeal is not timely perfected, a court of appeals does not have jurisdiction to address the merits of the appeal, and can take no action other than to dismiss the appeal.[61] Here, the Tenth Court of Appeals found Appellant's notice of appeal was not timely and dismissed the appeal for want of jurisdiction.[62] The basis of the Court of Appeals decision was that the trial court's October 14, 2015 Judgment rendered the earlier notice of appeal moot. The Court also found the Judgment was appealable as any other criminal Judgment which finds the defendant guilty and imposes a sentence.[63]

B. Was Appellant's June 15, 2015 Notice of Appeal Timely?

Although Appellant filed his notice of appeal from the May 29, 2015 Judgment adjudicating guilt, he does not complain about that Judgment on appeal. His complaint is with the October 14, 2015 Judgment placing him on shock probation.

There are really two questions here. The first is whether the Judgment granting shock probation is a Judgment, or appealable order, from which an appeal may be taken. The Court of Appeals had to necessarily find that it was, in order to reach the second question. The second is whether the June 15, 2015 notice of appeal allows

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60 *State v. Riewe*, 13 S.W.3d 408, 411 (Tex. Crim. App. 2000); *Slaton v. State*, 981 S.W.2d 208, 209-10 (Tex. Crim. App. 1998).

61 *Olivo v. State*, 918 S.W.2d 519 (Tex. Crim. App. 1999); *Slaton*, 981 S.W.2d at 210;

62 *See Smith v. State*, 518 S.W.3d 641, 645 (Tex. App.—Waco 2017, pet. granted.)

63 *Id.*

Appellant to appeal any subsequent order or Judgment of the trial court. The State's answer to both questions is a rather emphatic "no and no".[64]

1. Was the trial court's Judgment granting Appellant's motion for shock probation a Judgment or appealable order from which an appeal may be taken?

The Tenth Court of Appeals acknowledged the State's Motion to Dismiss and distinguished the instant case from the cases relied on by the State as follows:

> "The cases the State relies on to assert that no appeal may be taken from shock probation do not apply to the situation presented in this appeal. In those cases, it was the decision to grant or deny shock probation or the decision to amend the conditions of shock probation that was the subject of the appeal or an issue on appeal. Those actions of the trial court are not ones for which the statute authorizes an appeal. That does not mean, however, the actual judgment rendered by the trial court after granting a motion for shock probation cannot be appealed. It is a criminal judgment; and like any other criminal judgment which finds the defendant guilty and imposes a sentence, it can be appealed."[65]

The standard for determining jurisdiction is not whether the appeal is precluded

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[64] Both the State and the Court of Appeals acknowledge that *Shortt v. State*, No. 05-13-01639-CR, 2015 Tex. App. LEXIS 4808 (Tex. App.—Dallas May 12, 2015, pet. granted) (mem. op. not designated for publication) is currently pending before the Court of Criminal Appeals and may address this issue although the State and Court of Appeals view the issue differently. (*Smith* 518 S.W. 3d at 643 n.1).

[65] *See* Tex. Code Crim. Proc. Ann. art. 44.02 (West 2006); Tex. R. App. P. 26.2(a). *Smith* at 645.

by law, but whether the appeal is authorized by law.[66] The courts of appeals derive their authority from the Constitution of the State of Texas.[67] This provision means that a statute must expressly give the courts of appeals jurisdiction.[68] For example, with regard to deferred adjudication, the Texas Legislature authorized appeal of only two types of orders: (1) an order granting deferred adjudication, and (2) an order imposing punishment pursuant to an adjudication of guilt.[69] Orders modifying the terms or conditions of deferred adjudication are not appealable.[70]

The defendant's right to appellate review in criminal matters is provided by article 44.02 of the Texas Code of Criminal Procedure.[71] This review is generally understood to be of the judgments of the trial courts as defined by article 42.01 of the Code of Criminal Procedure.[72]

In a criminal case, a defendant has the right to appeal "a judgment of guilt or other appealable order."[73] An "appealable order" is only appealable where

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66 *State v. Robinson*, 498 S.W.3d 914, 917 (Tex. Crim. App. 2016); *Abbott v. State*, 271 S.W.3d 694, 696-97 (Tex. Crim. App. 2008).

67 *See* Tex. Const. art. V, § 6(a), (providing that courts of appeals "shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law" and "[s]aid courts shall have such other jurisdiction, original and appellate, as may be prescribed by law").

68 *Whitfield v. State*, 430 S.W.3d 405, 407-08 (Tex. Crim. App. 2014).

69 *Davis v. State*, 195 S.W.3d 708, 711 (Tex. Crim. App. 2006).

70 *Id.*

71 *See* Tex. Code Crim. Proc. Art. 44.02 (West 2006).

72 *See State v. Sellers*, 790 S.W.2d 316, 321 n.4 (Tex. Crim. App. 1990). Tex. Code Crim. Proc. Art. 42.01 (West Supp. 2016).

73 *See* Tex. R. App. P. 25.2(a)(2).

specifically authorized by a statutory or constitutional provision.[74]

The Court of Appeals recognized this, but distinguished an order granting shock probation which is not appealable from a criminal Judgment which is appealable. The State respectfully submits the Court of Appeals raises a distinction without a difference.

The Court of Appeals cites to a line of cases which provide that there is no statutory authority that authorizes an appeal from the imposition of shock probation.[75] It distinguishes the instant case from those cases by finding there was a new sentencing hearing and a new Judgment.[76]

As previously noted the hearing consisted of the trial court asking Appellant if he wanted shock probation, if he had disposed of a prior theft case and where he was going to live.[77] The State suggests this did not constitute a new sentencing hearing as contemplated by the Court of Appeals.[78]

Also, at least some of the cases cited by the Court of Appeals, and from which it

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74 *See Ragston v. State*, 424 S.W.3d 49, 52 (Tex. Crim. App. 2014); *Abbott v. State*, 271 S.W.3d 694, 696-97 (Tex. Crim. App. 2008) ("The standard for determining jurisdiction is not whether the appeal is precluded by law, but whether the appeal is authorized by law.").

75 *Smith* at 644.

76 *Smith* at 643 n.1. The Court does not cite to any authority in support of this finding.

77 (6 RR 4 - 8). There was no testimony or arguments of counsel.

78 *See, e.g. Ex parte Ingram,* No. 04-15-00459-CR, 2016 Tex. App. LEXIS 4331, at *6 (App.—San Antonio Apr. 27, 2016, (mem. op. not designated for publication), affirmed *Ex parte Ingram,* 2017 Tex. Crim. App. LEXIS 588 (Tex. Crim. App., June 28, 2017). ("Unlike *Ex parte Matthews,* 452 S.W.3d at 10, the record before this court clearly establishes the trial court did not hold a hearing, did not take arguments of counsel, and did not make a determination on the merits".)

seeks to distinguish the instant case, had more of a sentencing hearing than the trial court did here. For example, in *Pippin v. State*, the Appellant testified at the hearing on his application for shock probation that he had diabetes. Pippin's fellow inmates also testified about his medical condition.[79] In *Thursby v. State*, Appellant complained about the absence of the statements of facts from the hearing at which the trial court granted him shock probation.[80] In *Shortt v. State,* there was also a hearing.[81] Further, the shock probation statute requires there be a hearing prior to the trial court granting a motion for shock probation.[82]

The Tenth Court characterized the Judgment as an entirely new and complete Judgment.[83] But, when a trial court grants shock probation under the provisions of Article 42.12 § 6(a), it suspends the execution, rather than the imposition, of the sentence.[84] Rather than entering a new judgment, it merely is suspending the sentence of the existing Judgment. Further, the trial court here specifically stated Appellant would be under the terms and conditions he was under previously.[85] This

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79 *Pippin v. State*, 271 S.W.3d 861, 862 (Tex. App.—Amarillo 2008).

80 *Thursby v. State*, No. 05-94-01772-CR, No. 05-94-01773-CR, No. 05-94-01774-CR, No. 05-94-01775-CR, 1997 Tex. App. LEXIS 4378, at *3 (App.—Dallas Aug. 20, 1997) (mem. op. not designated for publication).

81 *Shortt v. State*, No. 05-13-01639-CR, 2015 Tex. App. LEXIS 4808 (Tex. App.—Dallas May 12, 2015, pet. granted) (mem. op. not designated for publication).

82 Article 42.12, sec. 6 of the Texas Code of Criminal Procedure, now Article 42A.202. *See* Tex. Code Crim. Proc. Art. 42A.202 (West Supp. 2016).

83 *Smith* at 643 n.1.

84 *State v. Robinson*, 498 S.W.3d 914, 919 (Tex. Crim. App. 2016), *O'Hara v. State*, 626 S.W.2d 32, 35 (Tex. Crim. App. 1981). Article 42.12, sec. 6 of the Texas Code of Criminal Procedure, now Article 42A.202. *See* Tex. Code Crim. Proc. Art. 42A.202 (West Supp. 2016).

85 (6 RR 4 – 8).

evidences an intention on the part of the trial court to continue the previous judgment save for suspending the sentence of incarceration. This brings the instant case squarely within the line of cases holding there is no appeal from an order of shock probation.

Judge Richardson's concurring opinion in *State v. Robinson* also addresses this issue, albeit in the context of the State's right to appeal the shock probation order.[86] Judge Richardson cited to *Perez v. State*,[87] and then discussed *Basaldua v. State*,[88] and *Houlihan v. State*,[89] dealing with "analogous orders".[90]

Judge Richardson noted:

> "In *Pippin v. State*, the Seventh Court of Appeals followed *Perez* and held that the court of appeals lacked jurisdiction to review an order granting shock probation. Other appellate courts have similarly held that they lacked jurisdiction to entertain such appeals. And, as recently as last year, in *Parker v. State*, the First Court of Appeals followed *Perez* and *Pippin* in holding that "there is no right of appeal from a trial court's order granting shock probation."[91]

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86 *See State v. Robinson*, 498 S.W.3d 914, 924 (Tex. Crim. App. 2016) (Richardson J, concurring).

87 *Perez v. State*, 938 S.W.2d 761 (Tex. App.—Austin 1997, pet. ref'd).

88 *Basaldua v. State*, 558 S.W.2d 2, 5 (Tex. Crim. App. 1977) (modification of the conditions of probation).

89 *Houlihan v. State*, 579 S.W.2d 213, 215-16 (Tex. Crim. App. 1979) (denial of shock probation).

90 *State v. Robinson*, 498 S.W.3d 914, 924 (Tex. Crim. App. 2016) (Richardson J, concurring)

91 *Id*; *see also Parker v. State*, No. 01-15-00334-CR, 2015 Tex. App. LEXIS 9586, *1 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (mem. op. not designated for publication) (first citing *Pippin*, 271 S.W.3d at 863-64, and then citing *Perez*, 938 S.W.2d at 762-63).

The line of Courts of Appeal decisions finding no appellate jurisdiction continues.[92] Recently, the Dallas Court of Appeals reaffirmed, in an unpublished opinion, there is no appellate jurisdiction to hear an appeal from an order imposing shock probation.[93]

Since the trial court's Judgment granting shock probation was not appealable, whether Appellant needed to file a new notice of appeal is really a moot question. It is moot because it really doesn't matter if a new notice of appeal is required or not, since the Court of Appeals doesn't have jurisdiction anyway. Since the Court of Appeals doesn't have jurisdiction, it cannot hear the matter or grant Appellant any relief.[94]

2. If the Judgment placing Appellant on Shock Probation is appealable, did Appellant have to file a new notice of appeal to complain about a condition of his shock probation?

Alternatively, and without waiving any of the foregoing, should this Honorable Court find the Judgment granting shock probation an appealable Judgment, the State

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92 *Parker v. State*, No. 01-15-00334-CR, 2015 Tex. App. LEXIS 9586, *1 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (mem. op. not designated for publication)

93 *See Walker v. State*, No. 05-16-00229-CR, 2017 Tex. App. LEXIS 2568, at *7 (App.—Dallas Mar. 23, 2017, no pet.) (mem. op. not designated for publication) ("we have no appellate jurisdiction to hear an appeal from an order imposing shock probation pursuant to Texas Code of Criminal Procedure article 42.12.").

94 *Chacon v. State*, 745 S.W.2d 377, 378 (Tex. Crim. App. 1988) (A cause, issue or proposition is or becomes moot when it does not, or ceases to, rest on any existing fact or right. If it is impossible for the Court to grant effectual relief for any reason, a cause is moot (citing to 5 Tex.Jur.3d 206, Appellate Review § 519 and 217 § 523)).

agrees with the Court of Appeals that Appellant was required to file a new notice of appeal. Because Appellant did not, his original notice of appeal was untimely.

A defendant's notice of appeal is timely if filed within thirty days after the day sentence is imposed or suspended in open court, or within ninety days after sentencing if the defendant timely files a motion for new trial.[95] A timely notice of appeal is necessary to invoke the Court of Appeal's jurisdiction.[96] Texas Rule of Appellate Procedure 26.2 provides that an appeal is perfected when the notice of appeal is filed within thirty days after the day sentence is imposed or suspended in open court, or after the day the trial court enters an appealable order, unless a motion for new trial is timely filed.[97]

Appellant is appealing an order that involves the imposition or suspension of a sentence, therefore, the notice of appeal was due to be filed within thirty days of the date the sentence was imposed.[98] Since the Judgment concerns an imposition or suspension of Appellant's sentence, Appellant was required to file a new notice of appeal within thirty days. His failure to do so, precludes the Court of Appeals from

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95 *See Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996) *see also* Tex. R. App. P. 26.2(a)(1).

96 *Olivo* at 522.

97 Tex. R. App. P. 26.2(a)(1); *see Rodarte v. State*, 860 S.W.2d 108, 109 (Tex. Crim. App. 1993); *Lair v. State*, 321 S.W.3d 158, 159 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd). *Mayorga v. State*, No. 13-17-00413-CR, 2017 Tex. App. LEXIS 8131, at *1-2 (App.—Corpus Christi Aug. 24, 2017, no pet.) (mem. op. not designated for publication).

98 *See Rodarte*, 860 S.W.2d 108, *Mayorga v. State*, No. 13-17-00413-CR, 2017 Tex. App. LEXIS 8131, at *2 (App.—Corpus Christi Aug. 24, 2017, no pet.) (mem. op. not designated for publication).

having jurisdiction over his case.

a. Perez v. State

Appellant cites to *Perez v. State* as authority that his original notice of appeal was sufficient to invoke the jurisdiction of the Court of Appeals. He argues *Perez* determined that, in an appeal from an order granting shock probation, the time to file a notice of appeal was from the date of the original order imposing the sentence.[99]

The State respectfully disagrees with Appellant's assertion that *Perez* provides him authority for filing the notice of appeal from the original order adjudicating guilt.[100] The primary issue in *Perez* was whether the Austin Court of Appeals had jurisdiction over an appeal from an order granting shock probation.[101] *Perez* found that it lacked authority to entertain a direct appeal from the order placing Appellant on shock probation. Having found that it lacked authority to address Appellant's issue, it then "alternatively" discussed the timeliness of Appellant's notice of appeal.

The State respectfully argues this "alternative" discussion of the timeliness of Appellant's notice of appeal was dicta because it was not necessary to the resolution of the case.[102] Obiter dictum is defined as a judicial comment made while delivering

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[99] *See* Appellant's brief, *Perez v. State,* 938 S.W.23d 761, 763 (Tex. App. – Austin 1997, pet. ref'd).

[100] Of course, *Perez,* and its progeny, provide that an appeal may not be taken from an order granting or refusing shock probation.

[101] *See Perez* at 762 ("We initially consider the procedural question of whether an appeal lies from an order granting shock probation").

[102] Obiter dictum is defined as: Words of an opinion entirely unnecessary for the decision of the case. … A remark made, or opinion expressed, by a judge, in his decision upon a cause, "by

a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).[103] In contrast, a court's holding is "[a] court's determination of a matter of law pivotal to its decision[.]"[104] Since dicta has no precedential value, the State argues it does not help Appellant's argument.[105]

b. Dodson v. State

Appellant also cites to *Dodson v. State* in support of his contention.[106] *Dodson* cites to the dicta in *Perez* and states the time to invoke appellate jurisdiction expired thirty days following imposition of the sentences.[107] Arguably, *Dodson* would support Appellant's position. But, *Dodson* also found that an order entered concerning shock probation is not appealable.[108] Therefore, this case too ultimately

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the way," that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument. Such are not binding as precedent. Blacks Law Dictionary, 6th Ed., p. 1072 (emphasis added); *State v. Skiles*, 938 S.W.2d 447, 456 n.1 (Tex. Crim. App. 1997) Baird, J. Concurring and dissenting opinion at n.1).

[103] Blacks Law Dictionary 1177 (9th ed. 2009).

[104] Id. at 800; *Kuykendall v. State*, 335 S.W.3d 429, 432-33 (Tex. App.—Beaumont 2011, pet. ref'd).

[105] *Ex parte Ragston*, 402 S.W.3d 472, 478 n.4 (Tex. App.—Houston [14th Dist.] 2013) aff'd, 424 S.W.3d 49 (Tex. Crim. App. 2014). ("Because neither unpublished criminal cases nor dicta carry any precedential value, these cases are not helpful to our analysis of this issue in this case"). S*ee also Edwards v. Kaye*, 9 S.W.3d 310, 314 (Tex. App.-- Houston [14th Dist.] 1999, pet. denied) (defining "dictum" and noting that it "is not binding as precedent").

[106] *See Dodson v. State*, 988 S.W.2d 833 (Tex. App.—San Antonio 1999, no pet.), *see also* Appellant's brief.

[107] *Dodson* at 834.

[108] *Id*., (finding an order entered pursuant to Article 42.12 § 6 is not appealable).

supports the State's contention, not Appellant's.[109] If the judgment granting shock probation is considered an appealable order, as Appellant and the Tenth Court believe, then Rule 26.2(a)(1) kicks in and requires the notice of appeal to be filed within thirty days of that order.[110]

3. Can Appellant's notice of appeal be considered premature?

Appellant alternatively argues his notice of appeal should be considered premature.[111] The State completely agrees with the Tenth Court here which found Appellant's original notice could not be considered premature.[112]

The rules of appellate procedure permit a party in a criminal case to file a premature notice of appeal where the notice of appeal is filed after a finding of guilt has been made, but before sentencing.[113] Citing to the language of Rule 27.1(b), Appellant argues the rule would allow for the premature notice of appeals to be effective either when sentence is imposed or suspended.[114]

Here, the original notice of appeal was filed after Appellant's sentence was imposed. The Rule uses the disjunctive "or" rather than the conjunctive "and". "Or"

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109 Appellant argues that if *Perez* or *Dodson* had done what he did here, their claims would have been reviewed on the merits. However, both Courts found they did not have jurisdiction to review appeals from shock probation.

110 *See* Tex. R. App. P. 26.2(a)(1), *Smith* at 645.

111 *See* Appellant's brief.

112 *Smith* at 644.

113 *See* Tex. R. App. P. 27.1(b); *Franks v. State*, 219 S.W.3d 494, 497 (Tex. App. — Austin 2007, pet. ref'd); *see also Gipson v. State*, 268 S.W.3d 862, 863-64 (Tex. App. —Waco 2008, no pet.).

114 *See* Appellant's brief, see Rule 27.1(b).

has been commonly defined as a disjunctive particle used to express an alternative or to give a choice of one among two or more things."[115] Thus, "the disjunctive 'or' usually, but not always, separates words or phrases in the alternate relationship, indicating that either of the separated words or phrases may be employed without the other."[116]

Appellant can't have it both ways. If he files the notice of appeal following the imposition of a sentence, he can't later argue the same notice should be considered prematurely filed because it was filed before the suspension of that same sentence.

Appellant cites to *Kirk v. State* which provides for a "recalculation" of an appellate timetable when the trial court rescinds an order granting a new trial.[117] The reason for that was to preserve a defendant's right to appeal.[118] That is a different situation than the one presented here which would allow for a defendant to file a

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115 *City of Lubbock v. Adams*, 149 S.W.3d 820, 827 (Tex. App.—Amarillo 2004, pet. denied) (quoting Blacks Law Dictionary 1095 (6th ed. 1990)).

116 *Perez v. State*, 11 S.W.3d 218, 225 (Tex. Crim. App. 2000); *Licerio v. State*, No. 12-11-00326-CR, 2012 Tex. App. LEXIS 10897, at *11-12 (App.—Tyler Jan. 31, 2012, pet. ref'd) (mem. op. not designated for publication).

117 *Kirk v. State*, 454 S.W.3d 511, 515 (Tex. Crim. App. 2015) ("We share this concern [with the Supreme Court about depriving a party of the ability to appeal,] and hold that rescinding an order granting a new trial outside the seventy-five-day time limit results in re-calculating appellate timetables. In that situation, the rescinding order shall be treated as an 'appealable order' under Texas Rule of Appellate Procedure 26.2, and appellate timetables will be calculated from the date of that order. If the defendant previously filed a notice of appeal with respect to the trial court's judgment of conviction, that notice shall be treated as a prematurely filed notice of appeal with respect to the rescinding order, and the defendant will be entitled to appeal, not only the trial court's decision to rescind the order granting a new trial, but also any issue that he could have appealed if the motion for new trial had never been granted.").

118 *Id.*

notice of appeal within thirty days of the Judgment of shock probation. A recalculation of the Appellate timetable would not be necessary to preserve a defendant's right to appeal as in *Kirk*. All Appellant had to do here was file a new notice of appeal.

II. CONCLUSION

An appeal may not be taken from either the granting or denial of a defendant's motion for shock probation. While the State disagrees with the Tenth Court of Appeals' reasoning, it does agree with the Court's ultimate conclusion that it did not have jurisdiction to entertain this appeal. The State asks this Court to uphold the Court of Appeal's dismissal of this appeal but to do so because the Court did not have jurisdiction over an appeal from a Judgment granting shock probation.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, the State of Texas prays this Court AFFIRM and MODIFY the opinion of the Tenth Court of Appeals to AFFIRM the dismissal of the appeal and MODIFY the reason for the dismissal as the lack of jurisdiction to hear an appeal from a judgment granting shock probation.

Respectfully Submitted,

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Certificate of Service

By my signature affixed below, I, Charles Karakashian, Jr., certify that, on November 20, 2017, a true and correct copy of the foregoing State's Brief was delivered to Mr. Justin Bradford Smith, attorney of record for Appellant, by electronic mail through the required e-filing service at justin@templelawoffice.com.

/s/ Charles Karakashian, Jr.
Charles Karakashian, Jr.
Special Prosecutor

Certificate of Compliance

By my signature affixed below, I, Charles Karakashian, Jr., certify that the foregoing Brief complies with the requirements of Tex. R. App. P. Rule 9.4 and, according to Microsoft Word 2010, in which it was created, contains 6298 words, beginning at the words "Statement of Facts" in the heading of that section, and concluding with the final word in the Prayer, in accordance with Rule 9.4(i) (1).

/s/ Charles Karakashian, Jr.
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